Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

v.

AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORP., and JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a claim under the RICO statute, 18 U.S.C. §§1961 *et seq.*, can a corporate subsidiary constitute a RICO person when the RICO enterprise is defined as a group of affiliated corporations that includes the parent corporation and the other subsidiaries?

2. In a claim under the RICO statute in which the plaintiff has not been permitted to conduct discovery, is it proper to dismiss the claim because the plaintiff could not identify the individual RICO persons, but, instead, identified them as "John Does"?

3. In a claim under the RICO statute based on mail fraud, is it proper to dismiss a complaint for failure to plead a pattern of racketeering activity pursuant to Fed.R.Civ.P. 9(b) when the mail fraud is based on the mailing of form documents and the identity of other recipients is within the sole control of the defendants?

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PREVIOUS OPINIONS

The citations of the official and unofficial reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

Seventh Circuit denied petition for rehearing *en banc*: *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998). App. 9.

Seventh Circuit affirmed decision of the District Court for the Northern District of Illinois: *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998). App. 1-8.

District Court for the Northern District of Illinois granted defendants' motion to dismiss and dismissed suit with prejudice: *Emery v. American General Finance, Inc.*, 952 F.Supp. 602 (N.D.Ill. 1997). App. 10-18.

District Court for the Northern District of Illinois granted defendants' motion to dismiss: *Emery v. American General Finance, Inc.*, 938 F.Supp. 495 (N.D.Ill. 1996).

Seventh Circuit denied petition for rehearing: *Emery v. American General Finance, Inc.*, unreported.

Seventh Circuit reversed and remanded decision of the District Court for the Northern District of Illinois: *Emery v. American General Finance, Inc.*, 71 F.3d 1343 (7th Cir. 1995).

District Court for the Northern District of Illinois granted defendants' motion to dismiss: *Emery v. American General Finance, Inc.*, 873 F.Supp. 1116 (N.D.Ill. 1994).

STATEMENT OF JURISDICTION

The Seventh Circuit affirmed the decision of the District Court for the Northern District of Illinois dismissing this suit with prejudice on January 28, 1998. App. 1-8. The petitioner, Verna Emery, timely filed a petition for rehearing *en banc* on February 11, 1998, which was denied on February 24, 1998. App. 9. The petitioner now timely seeks a writ of certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §1961—Definitions

As used in this chapter [18 U.S.C. §§1961 *et seq.*]—

. . .

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962—Prohibited activities

. . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

Factual Background

Verna Emery brought this consumer class action against American General Finance, Inc. ("AGFI"), American General Finance Corporation ("AGFC"), and John Does 1-10, seeking redress for their practice of engaging in mail fraud by "flipping" consumer loans. Ms. Emery's Second Amended Complaint, App. 19-42, describes the defendants' practice of soliciting their current consumers to borrow additional money and extending the additional funds by *refinancing* the existing loans rather than writing new loans.

Ms. Emery initially borrowed $1,983.81 with an annual percentage rate of 36%. The note was secured by miscellaneous personal property. The amount financed included $51 for credit life insurance, $120.82 for credit disability insurance, $64.42 for insurance on the personal property, and $6.00 for purported "non-filing insurance." The note provided that in the event of prepayment or acceleration, finance charges and refunds of unearned insurance premiums would be credited using the "Rule of 78's."

Shortly before January 29, 1993, defendants solicited Emery to borrow additional money. The solicitation, a form letter, purported to be an offer for an additional loan (it used such terms as "[w]e can lend you money" and "I have money to loan" and suggested that "we could write your check on the spot"). The letter did not disclose that if Ms. Emery accepted the offer, she would be *refinancing* her existing obligation. Ms. Emery signed a new note on January 29, 1993 for $2,399.83. Her finance charge was $1,641.28, and her annual percentage rate was 35.96%. The amount financed included $61.75 for credit life insurance, $146.20 for credit disability insurance, $77.99 for insurance on collateral, and $6.00 for purported "non-filing insurance." Another $96.80 of the amount financed was entitled "CU for IN," which Ms. Emery cannot identify. The "Rule of 78's" applied to this new note as well.

Ms. Emery paid *over $800.00 more* for the refinanced loan than she would have paid for a new loan with the same rate for the amount she wished to borrow. Defendants induced Ms. Emery to refinance her existing loan and did not disclose the fact that it would be substantially cheaper for her to simply obtain a second loan instead of refinancing the first loan.

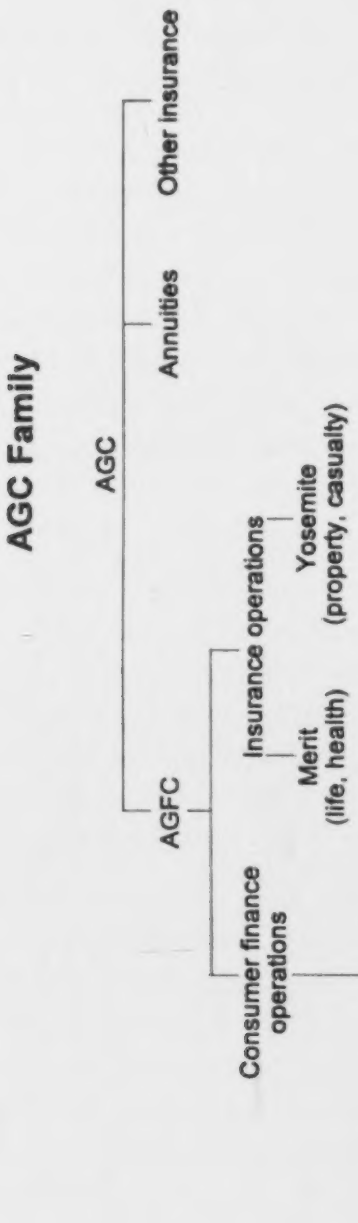
Defendants targeted "blue-collar craftsman, factory workers, and laborers in low density satellite towns and suburbs of small industrial and manufacturing metros" who engage in activities like using chewing tobacco, eating at steak houses, listening to religious radio stations, watching daytime television dramas, installing shocks on their own automobiles, and watching professional wrestling.

RICO Combinations Alleged in Second Amended Complaint

In the case at bar, Ms. Emery alleged *nine different RICO combinations* as the basis for establishing the liability of defendants. Those combinations are as follows:

Count	Person	Enterprise	Relationship to Person
Count I	(a) AGFC	AGC	Parent of person
	(b) AGFC	Corporate group headed by AGC	Parent and corporate family of person
	(c) AGFC	AGFC, AGFI, and other affiliates	Person and person's subsidiaries
Count II	(a) AGFI	AGC	Grandparent of person
	(b) AGFI	Corporate group headed by AGC	Grandparent and corporate family of person
	(c) AGFI	AGFC, AGFI and other affiliates	Person, parent of person and others
Count III	(a) John Does	AGC	
	(b) John Does	Corporate group headed by AGC	
	(c) John Does	AGFC, AGFI and other affiliates	

The corporate structure of the defendants is diagrammed below:



Procedural History

Ms. Emery filed a lawsuit against defendants in the Northern District of Illinois on August 24, 1994 alleging violation of the RICO statute, 18 U.S.C. §§1961 *et seq.*, based on mail fraud. The District Court dismissed Ms. Emery's original complaint on December 21, 1994. The Seventh Circuit reversed, holding that the complaint adequately pled one instance of mail fraud but failed to plead a pattern of racketeering activity as required by the RICO statute. Ms. Emery amended her complaint, and, on remand, the District Court dismissed the First Amended Complaint. Ms. Emery then filed her Second Amended Complaint, which the District Court again dismissed.

In its decision of January 28, 1998, a panel of the Seventh Circuit (Posner, Chief Judge, and Bauer and Coffey, Circuit Judges) affirmed the decision of the District Court, holding that Ms. Emery failed to allege a pattern of racketeering activity and failed to allege a RICO person separate and distinct from the RICO enterprise. Ms. Emery respectfully suggests that the Seventh Circuit (i) improperly limited the scope of both civil and criminal RICO liability by making it virtually impossible for corporate subsidiaries to constitute RICO persons; (ii) improperly dismissed her RICO claim against the "John Doe" defendants; and (iii) improperly found that Ms. Emery failed to plead more than one instance of fraud with particularity and thus did not allege a pattern of racketeering activity despite the facts that (a) the mail fraud was based on standard form documents that defendants had mailed to many people, and (b) the information about who received the fraudulent letters was within the sole control of the defendants. Ms. Emery respectfully

requests that the Court grant her petition for certiorari in this case to resolve these issues.

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DECISION IMPROPERLY PRECLUDES CORPORATE SUBSIDIARIES FROM CONSTITUTING RICO PERSONS.

Of the nine possible RICO person/enterprise combinations alleged by Ms. Emery, five involve situations in which the person is a subsidiary of the enterprise (I(a), I(b), II(a), II(b), and II(c) from the chart above). The Seventh Circuit's decision essentially renders it impossible for a subsidiary to constitute a RICO person. As such, the Seventh Circuit's decision contradicts the plain language of the RICO statute and conflicts with decisions of eight Circuit Courts of Appeal.

A. The Seventh Circuit's decision contradicts the plain language of the RICO statute.

The RICO statute imposes liability on "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" who "conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). Sections 1961(3) and (4) provide the following definitions:

> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

AGFC and AGFI are both "entit[ies] capable of holding a legal or beneficial interest in property." The two subsidiaries are associated with their parents and conduct part of the affairs of the enterprises, which include the parents. The RICO persons thus satisfy the explicit definition that Congress provided in 18 U.S.C. §1961(3).

The Seventh Circuit, however, effectively held that a corporate subsidiary can *never* be a RICO person, thus altering the plain language of the statute and adding a new barrier for civil RICO plaintiffs. The Seventh Circuit based its reasoning on the notion that, on some generalized level, corporate subsidiaries serve the same purposes as corporate divisions. The Seventh Circuit postulated that a corporation can choose to conduct its activities in two manners: it can either create its own divisions to carry out corporate tasks, or it can form subsidiaries that serve the same function as divisions but constitute separate entities. The Seventh Circuit reasoned that because corporations can carry out the same tasks in either manner, a corporate subsidiary that engages in a pattern of racketeering activity *cannot be a RICO person* because a similarly-situated corporate *division*, carrying out the same activities, would not constitute a RICO person. The Seventh Circuit stated:

> There is no allegation that by using subsidiaries rather than divisions the AGF group somehow made it easier to commit or conceal the fraud of which the plaintiff complains.

App. 6. The Seventh Circuit thus attempts to limit the contours of the RICO statute by constructing an artificial barrier that was not contemplated by Congress and is not found anywhere in the text of the statute.

When a corporation creates a subsidiary corporation, it creates a new legal entity distinct and separate from itself. Corporations gain many benefits by operating through subsidiaries rather than divisions. However, liabilities exist alongside the benefits.

There is nothing in the text of RICO to support the Seventh Circuit's decision that corporate subsidiaries cannot be RICO persons—such a result cannot be reconciled with the plain language of the RICO statute. When Congress has spoken clearly, the plain language of the statute prevails. *Salinas v. United States*, ___ U.S. ___, 1997 U.S. LEXIS 7332, *10 (1997) ("courts may deviate from the plain language of a statute only in 'rare and exceptional circumstances'"); *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should give effect to "plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term").

The Seventh Circuit seeks to justify its artificial restriction by reasoning that a RICO plaintiff who learns that a corporate subsidiary is engaging in fraud can simply name the individual defendants (i.e., "corporate officers or employees") who are responsible for the fraud.[1] App. 6-7.

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[1] In fact, Ms. Emery brought Count III of the Second Amended Complaint against individual defendants (the John Does), who were identified as the individual officers or employees responsi-

(continued...)

The Seventh Circuit's concession is, however, inadequate. There are important reasons, like forfeiture of corporate assets, why a plaintiff (or the government) might want to name a corporate subsidiary as a defendant rather than merely naming the particular corporate officer who devised and implemented the scheme.

There is no statutory support for the Seventh Circuit's unprecedented limitation on a subsidiary being named a RICO person. Because the Seventh Circuit sidestepped the plain language of RICO by imposing its own restriction on RICO pleading, Ms. Emery respectfully requests that this Court grant certiorari and reverse the Seventh Circuit's decision.

B. The Seventh Circuit's decision conflicts with decisions of other circuits and with a previous decision of the Seventh Circuit itself.

In a previous decision that was affirmed by this Court, the Seventh Circuit explicitly held that wholly-owned corporate subsidiaries themselves can be RICO persons. *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, *American National Bank & Trust Co. v. Haroco*, 473 U.S. 606 (1985).

(...continued)
ble for devising the policies at issue in this case. See III(a), III(b) and III(c) from the chart above. Count III would seem to comply with the Seventh Circuit's explicit requirements, yet the Seventh Circuit affirmed dismissal of this count.

There is no distinction, analytically, between a claim in which an individual employee who is given authority over part of a company's affairs is named the RICO person and a claim in which an entire subsidiary given similar authority is named the RICO person. In its decision in this case, the Seventh Circuit therefore tossed aside the reasoning of eight other courts of appeal when it held that corporate subsidiaries are not proper RICO persons. *See, e.g., Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995); *Landry v. Air Line Pilots Association Int'l*, 901 F.2d 404 (5th Cir. 1990); *Davis v. Mutual Life Insurance Co. of New York*, 6 F.3d 367 (6th Cir. 1993); *United Healthcare Inc. v. American Trade Ins.*, 88 F.3d 563 (8th Cir. 1996); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs and Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990).

In these cases, the circuit courts held that individual members of corporate groups can constitute RICO persons. In many other cases, circuit courts have found that the imposition of liability on such a party—an individual or a corporation—is consistent with the purpose of RICO—to proscribe the conduct of those who exploit authority and resources conferred by being part of an enterprise. *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951 (7th Cir. 1996); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989); *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *Napoli v. United States*, 32 F.3d 31 (2d Cir. 1994); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994); *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *United States v. London*, 66 F.3d 1227 (1st Cir. 1995).

When the Seventh Circuit's opinion in this case is read together with its opinion in *Fitzgerald v. Chrysler*, 116 F.3d 225 (7th Cir. 1997), it is clear that plaintiffs in the Seventh Circuit can no longer plead *any* RICO claim based on a person/enterprise combination within a corporate family. The Seventh Circuit in *Fitzgerald* held that a RICO claim based on the parent as person and the subsidiaries as enterprise is not viable; in this case, the Seventh Circuit found the *opposite* configuration invalid.

As such, the Seventh Circuit has broken with the clear trend of RICO case law. Circuit after circuit has held that when one member of a corporate group is assigned the task of administering some line of business engaged in by the corporate group, that member is in a position equivalent to that of a manager of a corporation who uses his position to engage in a pattern of fraud.

As this Court stated in *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985),

> [RICO] has become a tool . . . against respected and legitimate enterprises. Yet Congress wanted to reach both legitimate and illegitimate enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued . . . . The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth . . . . [T]his defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

In sum, there is no support in the statute or the case law for the Seventh Circuit's holding that one company within a corporate group that is delegated authority to conduct part of the group's business and does so through a pattern of racketeering activity cannot constitute a RICO person. The plain language of the statute and the reasoning of eight courts of appeal (and previous decisions of the Seventh Circuit itself) stand consolidated against this proposition.

II.

THE SEVENTH CIRCUIT IMPROPERLY DISMISSED THE RICO CLAIM AGAINST THE INDIVIDUAL DEFENDANTS.

In this case, the plaintiff was not permitted to conduct discovery before responding to the defendants' motions to dismiss. As a consequence, she did not know which individuals devised the fraudulent activity on behalf of the corporate subsidiary. In its discussion of Fed.R.Civ.P. 9(b)'s pleading requirements, the Seventh Circuit acknowledged that a plaintiff could be placed in a "Catch-22 situation" in which she was barred from seeking the very information essential to adequately pleading a RICO violation. App. 4. However, the Seventh Circuit failed to apply this insight to its consideration of the RICO person/enterprise pleading requirements, stating that

> the individual defendants are not alleged to control the corporation alleged to have committed the frauds that constitute the RICO violation, or a corporate division or other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their

> own little bailiwick. They are alleged merely to have devised the fraud . . . . so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity—and thus automatically—even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

App. 8. The Seventh Circuit appears, then, to have based its dismissal of the "John Does" claim in part upon the notion that individual RICO defendants must be in positions of corporate control. Such a holding conflicts directly with the Third Circuit's decision in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) ("one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them").

III.

THE SEVENTH CIRCUIT IMPROPERLY HELD THAT ALLEGATIONS OF MAIL FRAUD BASED ON DEFENDANTS' TRANSMITTAL OF NUMEROUS COPIES OF THE SAME FORM DOCUMENT DID NOT CONSTITUTE A PATTERN OF RACKETEERING.

Ms. Emery's RICO claims are premised on allegations of mail fraud, which must be pled with particularity under Fed.R.Civ.P. 9(b). The document she received was a form letter that was sent to many other low-income consumers. The Seventh Circuit held that the letter was sufficiently misleading to constitute a violation of the mail fraud statute. App. 2. However, the Seventh Circuit improperly held that Ms. Emery failed to allege a pattern of racketeering activity because she *could not identify* others who received the same letter by name and, therefore, failed to plead other instances of fraud with particularity.

The Seventh Circuit acknowledged that Ms. Emery was precluded from taking any discovery concerning these matters. The Seventh Circuit also acknowledged that Fed.R.Civ.P. 9(b) is "satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery." App. 4. *Accord*, *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Building Company v. Ameritrust Company, N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).

Nevertheless, the Seventh Circuit refused to reverse the District Court's dismissal of the complaint, stating that Ms. Emery "didn't explore the possibility of obtaining from the defendants or other sources, without discovery, the identity of other recipients of the form letter . . . ." App. 4. There is no such requirement that plaintiffs obtain information from "other sources," whatever that phrase means.

Ms. Emery established that the form document she received constituted mail fraud. Because the identities of other recipients were completely within the purview of the defendants, she satisfied the pleading requirements of Fed.R.Civ.P. 9(b). The Seventh Circuit thus imposed an improper pleading requirement under Fed.R.Civ.P. 9(b) when it determined that she failed to allege a pattern of racketeering.

CONCLUSION

For all the reasons stated above, petitioner Verna Emery respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the opinion of the Seventh Circuit affirming dismissal petitioner's complaint.

Respectfully submitted,

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